

# CAYMAN ISLANDS ENFORCEMENT GUIDELINES: COMMON REPORTING STANDARD AND ECONOMIC SUBSTANCE

## An overview of the Cayman Islands Common Reporting Standard and Economic Substance Enforcement Guidelines

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### Introduction

The Cayman Islands Tax Information Authority (**TIA**) issued new **Enforcement Guidelines: Common Reporting Standard (CRS)** and **Enforcement Guidelines: Economic Substance (ES)** on 31 March 2022 and revised guidelines in June 2022<sup>1</sup> (the **Guidelines**). The Guidelines set out the TIA's principles and processes for taking enforcement action through administrative penalties for non-compliance under the CRS and the ES regimes.

**Core Objective.** The core objective of the TIA's compliance monitoring and enforcement function under the CRS and ES regimes is to ensure complete and accurate information is collected, reported and exchanged with the relevant international competent authorities, demonstrating the Cayman Islands' commitment to the effective implementation of the regimes.

### CRS Administrative Penalties

Administrative penalties under the CRS Enforcement Guidelines are monetary penalties imposed by the TIA under the *Tax Information Authority (International Tax Compliance) (Common Reporting Standard) Regulations (2021 Revision)* (the **CRS Regulations**). The TIA may impose a primary penalty for offences under Part 3 of the CRS Regulations (a **Primary Penalty**) of:

- up to approx. US\$60,976 for an offence committed by a body corporate<sup>2</sup>; or
- otherwise, up to approx. US\$24,390

Where a Primary Penalty has been imposed, the party is capable of remedying the breach<sup>3</sup> and the breach

has not been remedied, the TIA may impose further daily penalties of approx. US\$122 for each day the breach continues (a **Continuing Penalty**).

**Imputed Liability.** Where there is sufficient evidence to suggest that a director, manager or officer, etc. of a Cayman Islands financial institution (**FI**) intentionally committed an offence of a nature that is of sufficient seriousness and consequence, the TIA may impose an administrative penalty on the director, manager or officer, etc. of the FI, in addition to the FI itself.<sup>4</sup>

**Penalty Criteria.** The TIA must consider certain specific criteria set out in the CRS Enforcement Guidelines when deciding whether to impose a penalty and its amount. Where a party submits written representations to the TIA, the TIA will consider the representations in addition to the criteria.

**Penalty Amounts.** The CRS Enforcement Guidelines provide a non-exhaustive list of examples of offences under Part 3 of the CRS Regulations together with a corresponding administrative penalty amount that represents a starting point for the TIA's penalty considerations.<sup>5</sup>

**Defences.** Where a penalty is applied against an FI under Part 3, it is a defence for a party to prove they had a reasonable excuse. However, neither insufficiency of funds nor reliance on an agent (or anyone else) constitutes a reasonable excuse.

Where a penalty is applied against a director, manager or officer, etc. for an Imputed Offence, it is a defence to prove the party exercised reasonable diligence to prevent the breach.

<sup>1</sup> The full text of the CRS Enforcement Guidelines is available here: [CRS-Enforcement-Guidelines.pdf \(ditc.ky\)](#). The full text of the ES Enforcement Guidelines is available here: [ES-Enforcement-Guidelines.pdf \(ditc.ky\)](#).

<sup>2</sup> Also includes an individual who forms, or forms part of, an unincorporated Cayman financial institution.

<sup>3</sup> Pursuant to CRS Regulation 24(3), insufficiency of funds or reliance on an agent appointed under CRS Regulation 11 (or anyone else) does not, of itself, make the party incapable of remedying the contravention.

<sup>4</sup> The CRS Regulations provide for imputed criminal liability of directors, managers or officers, etc. of an FI and state that if an FI commits an offence against Part 3, all of the directors, managers or officers, etc. relating to the FI are also guilty of the offence (an **Imputed Offence**).

<sup>5</sup> The ultimate penalty imposed may be greater or less than the amount listed in the guidelines.

**Protection Against Double Jeopardy.** A prosecution against a person for an offence (whether or not a conviction resulted) prevents the TIA from imposing a penalty against that person for the same offence. However, the imposition of an administrative penalty does not prevent a criminal prosecution for the same offence.

**Limitation Periods.** The TIA may not impose a Primary Penalty for an offence under Regulation 15<sup>6</sup> more than 1 year after becoming aware of the breach<sup>7</sup>.

The TIA may not impose a Primary Penalty for an offence under Part 3 of the CRS Regulations after the earlier of (a) 1 year after becoming aware of the breach<sup>8</sup> or (b) 6 years after the breach happened.

There is no limitation period for imposing a Continuing Penalty.

**Interest.** Interest accrues on a penalty while any part of the penalty continues to be unpaid. The interest is a debt owing to the Crown. Interest will accrue even if the penalty is appealed and has been stayed.

**Right of Appeal.** Penalties may be appealed to the court and appeals must be made within 60 days after receipt of the penalty notice issued by the TIA, or any later period the court allows. The appeal acts as a stay of proceedings and the TIA cannot, without leave of the court, enforce the penalty or interest thereon until completion of the appeal.

## ES Administrative Penalties

Administrative penalties under the ES Enforcement Guidelines are monetary penalties imposed by the TIA under the *International Tax Co-operation (Economic Substance) Act (2021 Revision)* (the **ES Act**). The TIA must impose administrative penalties under the ES Act for:

- **Missed Reporting:** Failure by a relevant entity (**RE**) to submit an ES return by the deadline set out in the ES Act<sup>9</sup>, a primary penalty of approx. US\$6,098 and an additional penalty of approx. US\$610 for each day the failure to comply continues;

- **Failure of ES Test in Year 1:** Failure by an RE to satisfy the ES test in relation to its relevant activity in a financial year, a penalty of up to approx. US\$12,195; and
- **Failure of ES Test in Subsequent Year:** Failure by an RE to satisfy the ES test in relation to its relevant activity in a subsequent financial year<sup>10</sup>, a penalty of up to approx. US\$121,951.

**Penalty Amounts.** The ES Enforcement Guidelines provide a non-exhaustive list of baseline penalty amounts that the TIA may impose for breaches of the ES Act. The ultimate penalty amount imposed by the TIA may be greater or less than the amount listed in the guidelines if the facts and circumstances of the case require a different penalty amount to prevent an unfair result.

**Notice to Registrar.** Where the TIA issues a penalty notice for a failure of the ES test in a subsequent year, the TIA must provide the Cayman Islands Registrar with a report of the matters set out in the penalty notice together with any additional information. On receipt of the report, the Registrar must apply to the court for an order in accordance with the ES Act. If the court is satisfied that the RE was required to satisfy the ES test and failed to do so, the court may make an order requiring the RE to take specified action or the court may make an order that the RE be considered defunct and be struck from the register.

**Misclassification of an Entity.** If it comes to the TIA's attention that an RE has misclassified itself, and the deadline for the RE to submit its ES return has passed, the TIA will consider the RE to have missed reporting and will issue a penalty notice to the RE. The RE will then have 30 days from the date of the penalty notice to submit an ES return.

**Limitation Periods.** The TIA may not impose a penalty under the ES Act after the earlier of (a) 1 year after becoming aware of the breach, or (b) 6 years after the breach occurred.

<sup>6</sup> Failure to comply with the requirements of Part 2 of the CRS Regulations.

<sup>7</sup> With respect to a breach of a statutory filing deadline, the TIA deems itself to become aware of the offence on the day immediately after the filing is due.

<sup>8</sup> Where a compliance investigation is warranted to determine whether a breach had occurred, the TIA deems itself to become aware of the offence on the date the investigation is completed, and a preliminary determination is made.

<sup>9</sup> A relevant entity that is carrying on a relevant activity and is required to satisfy the ES test must prepare and submit to the TIA an ES return for the purpose of the TIA's determination as to whether the ES test has been satisfied in relation to that relevant activity. The ES return must be made within twelve months after the last day of the end of each financial year of the relevant entity commencing on or after 1 January 2019.

<sup>10</sup> A "subsequent financial year" is the financial year following a financial year in which a notice was issued in connection with a Failure of ES Test in Year 1.

**Right of Appeal.** An RE may appeal a penalty under the ES Act to the court:

- **Missed Reporting:** within 30 days after receipt of the penalty notice; and
- **Failure of ES Test (Year 1 & Subsequent Year):** within 28 days after receipt of the penalty notice;

and such appeal will act as a stay on the enforcement of the penalty. The court may affirm or reverse the determination and penalty or substitute its own penalty for that imposed by the TIA.

### Further Information

If you have any questions regarding the CRS or ES Enforcement Guidelines or would like assistance with your CRS or ES compliance obligations, please reach out to any of the persons below or to your usual Appleby contact.

### KEY CONTACTS



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